No. 89-369

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The First Circuit

BRIEF OF PETITIONER GENERAL MOTORS CORPORATION

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QUESTIONS PRESENTED

In 1985 the Commonwealth of Massachusetts revised its Clean Air Act implementation plan to provide an extension of time to 1987 for General Motors to comply with certain air regulations. The revision was adopted pursuant to the Clean Air Act and published EPA policy. The extension of time allowed GM time to build a new $200 million facility that achieved lower emissions than were otherwise required. EPA failed to approve or disapprove the Commonwealth's revision, and instead filed suit against GM seeking penalties for failure to meet the original deadline. The questions presented are:[1]

1. Where EPA has failed to act on a revision to a state plan within four months, as required by the Clean Air Act, may the government bring an action for civil penalties against a company that is in compliance with the revised plan?

2. Whether the decision below undermines the primary role of the states under the Act and interferes with the ability of states to make ongoing policy choices as to air pollution control measures?

3. Whether the decision below will create disincentives for even-handed administration of the Act and will unnecessarily enmesh the courts in litigation concerning the reasonableness of EPA's delay in approving state plans?

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[1] The names of all parties are set forth in the caption of this case. The appendix to the petition for certiorari (pp. 19a-21a) lists all parent companies, subsidiaries and affiliates as required by Rule 29.1. (DHMS Industries, Ltd. (Korea), listed at page 20a of that appendix, no longer exists.)

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OPINIONS BELOW

The opinion of the Court of Appeals was rendered on June 7, 1989. It is reported at 876 F.2d 1060 and is reprinted in the Appendix to the Petition for Certiorari.

The opinion of the District Court, which was rendered on May 16, 1988, is unpublished and appears at pp. 119-25 of the Joint Appendix.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1982). The petition for certiorari was timely filed

on September 5, 1989, and the Court granted the petition on December 4, 1989.

STATUTORY PROVISIONS INVOLVED

The Clean Air Act provides that the states are to be accorded primary responsibility for assuring air quality within their boundaries. 42 U.S.C. § 7407(a) (1982). This responsibility is fulfilled primarily through the promulgation of Implementation Plans by the States, with general oversight by the federal Environmental Protection Agency ("EPA"). 42 U.S.C. § 7410 (1982). The statute requires EPA to act to approve or disapprove State Implementation Plans ("SIPs") and revisions to SIPs within four months. 42 U.S.C. § 7410(a)(2), (3) (1982). The pertinent provisions of the statute are reprinted in Appendix A to this brief.

STATEMENT OF THE CASE

This case concerns the appropriate division of authority between the federal government and the states in the establishment of State Implementation Plans under the Clean Air Act. Relying on an EPA policy published in 1981, the Commonwealth of Massachusetts revised its SIP regulations to grant General Motors a 20-month extension of time to comply with certain air emission limits. The purpose of the SIP revision was to allow General Motors time to construct a new automobile painting facility using a more advanced, lower-emitting painting system than the facility it replaced. EPA failed to approve or disapprove the SIP revision. The new facility was constructed and the extension expired. EPA then filed suit in August 1987 seeking penalties to enforce the 1985 deadline in the original SIP.

Under the Clean Air Act, the states have primary responsibility for developing plans to implement the Act. The statute grants EPA limited authority to approve or disapprove such plans or revised plans within four months.

Citing the Fifth Circuit's decision in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987), General Motors argued that EPA's failure to meet the four-month deadline in this case barred any enforcement action against General Motors unless and until EPA completes its review and in fact disapproves the revision. The district court agreed and entered summary judgment for General Motors. The United States Court of Appeals for the First Circuit reversed, expressly declining to follow the rule established in *American Cyanamid*.

A. Statutory Background

The Clean Air Act of 1970 established a federal-state partnership for the control of air pollution. The statute creates a logical and straightforward division of authority. The federal government, through the EPA, establishes the national air quality goals for various pollutants, such as ozone, called National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7409. However, when it comes to determining the source-specific emission limits to achieve the national standards, each state has "the primary responsibility for assuring air quality" within its borders. 42 U.S.C. § 7407(a). Under the Act, each state is required, after notice and public hearings, to adopt a State Implementation Plan ("SIP") consisting of regulations providing for the attainment, implementation, and enforcement of the national standards for sources within the state. 42 U.S.C. § 7410.

Each state must submit its SIP to EPA for review and approval. 42 U.S.C. § 7410(a)(1). However, Congress believed it important that the states retain wide latitude in determining how national standards should be achieved, given local needs and conditions. Accordingly, EPA was prohibited from rejecting a state SIP if it was designed to achieve and maintain the national standards. 42 U.S.C. § 7410(a)(2). This Court has emphasized that "the State is at liberty to adopt whatever mix of emission limitations

it deems best suited to its particular situation" as long as the net result is compliance with the national standards. *Train* v. *Natural Resources Defense Counsel*, 421 U.S. 60, 79 (1975).

The Act contains various deadlines, including those for EPA action on SIPs.[1] Under 42 U.S.C. § 7410(a)(2), EPA is required to approve or disapprove a SIP within four months of its submission. This requirement for prompt review by EPA serves to ensure rapid implementation of the state programs, and to minimize the time during which there may be differences between state and federal air programs. A federally approved SIP is enforceable by both the state and the federal government.[2]

The statute allows a state to revise its SIP at any time it deems appropriate. 42 U.S.C. § 7410(a)(3). Congress anticipated that the design and administration of SIPs would be an ongoing process to take into account new air quality data, technological and economic considerations, and evolving policies. EPA's review of a SIP revision is governed by the same substantive and procedural requirements applicable to original SIPs, including the duty to act on SIP revisions within four months. *Id.* As noted above, the four-month deadline requires EPA to render a prompt decision, so that the state may, if necessary, make appropriate adjustments in its plan and proceed to administer and enforce it with minimal disruption and confusion.

B. The Massachusetts SIP

General Motors owns and operates an automobile assembly plant in Framingham, Massachusetts. The plant

[1] The Act contains deadlines for states to promulgate certain aspects of their plans. 42 U.S.C. § 7410(a)(1). The Act also contains deadlines for the attainment of air quality standards. For ozone the deadline is December 31, 1987. 42 U.S.C. § 7502(a)(2).

[2] The state can enforce it as a part of its legislative and regulatory process. EPA's enforcement authority derives from the Clean Air Act, which authorizes federal enforcement in cases where an applicable EPA-approved SIP is violated. 42 U.S.C § 7413(a)(1).

contains a paint shop that is a source of volatile organic compounds ("VOCs"), which contribute to ozone. In 1979, the Commonwealth of Massachusetts promulgated SIP regulations establishing limits on emissions of VOCs. 310 CMR 7.18(7), J.A. 27. These regulations applied to automobile painting operations at GM's Framingham plant, the only automobile plant in the Commonwealth. As originally promulgated, the regulations required full compliance with the emission limits by December 31, 1985—two years before the Clean Air Act's final 1987 compliance deadline for ozone. 42 U.S.C. § 7502(a)(2). These SIP regulations were approved by EPA in 1980.

On October 2, 1981, shortly after the Massachusetts SIP requirements were approved, EPA published a policy statement advocating delay of the compliance dates for automobile painting operations up to the 1987 statutory deadline. 46 Fed. Reg. 51386 (1981), J.A. 30. Deferral of deadlines in existing SIPs was suggested by EPA as part of its effort to "reduce the regulatory burden on the motor vehicle industry." *Id.* The policy noted that deadline deferrals would allow the industry time to develop and implement more cost-effective technology, including new painting methods and control technology, and would allow a more orderly compliance effort nationally. *Id.* EPA stated that it "will approve" state SIP revisions submitted, consistent with the policy, which postpone final compliance with the automobile painting limits up until 1987. *Id.*, J.A. 33-34. In order to allow the industry to concentrate on the development of cost-effective final control techniques, EPA recommended that states not impose interim emission limits, but simply grant an extension of time to meet final limits. *Id.* at 51387, J.A. 35.

Pursuant to this policy statement, General Motors in 1984 submitted a request to the Commonwealth of Massachusetts for extension of the deadline in 310 CMR 7.18(7) to December 31, 1987, for the automobile coating operations at the Framingham plant. This request was based

on the proposed installation of abatement controls at General Motors' then-existing lacquer painting facilities at the plant. J.A. 38.[3] In mid-1985, General Motors revised its request to reflect a decision to adopt a more substantial long-term air pollution control strategy at the Framingham facility. General Motors decided to close the lacquer facility and build, at a cost of over $200 million, a technologically innovative basecoat/clearcoat enamel paint system.[4] This new system, although much more costly to install, had the advantages of lowering emissions *substantially below* the level required by 310 CMR 7.18(7), and of improving the efficiency and competitiveness of the Framingham plant. On June 7, 1985, General Motors informed the Commonwealth of its revised plans and reiterated its request for an extension of the SIP compliance deadline. J.A. 41.

The Commonwealth provided public notice and held a hearing on the proposed SIP revision, which was attended by EPA representatives. J.A. 61. Following the public hearing, the Commonwealth revised its SIP to extend the automobile compliance deadline for 20 months to August 31, 1987, several months short of the final Clean Air Act deadline and GM's requested extension. The revised SIP was submitted by the Commonwealth to EPA for approval on December 30, 1985. J.A. 50. There was good reason to believe that the Commonwealth's SIP revision was approvable, based on EPA's 1981 policy and Agency actions to implement that policy.[5]

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[3] The cost of this conventional control option was estimated by GM to be under $20 million.

[4] This basecoat/clearcoat system was cited with approval in EPA's 1981 policy. 46 Fed. Reg. 51386 (1981), J.A. 30. EPA orders issued to several automobile companies under § 111(j) of the Act, 42 U.S.C. § 7411(j), also recognized this system as innovative technology. *See* 40 C.F.R. § 60.398.

[5] Earlier that year, EPA proposed to approve a request for a similar extension of the compliance deadline for a GM plant in Delaware, 50 Fed. Reg. 18693 (1985), and EPA approved a similar deferral for a Ford plant in Virginia. 50 Fed. Reg. 20602 (1985). In the following year, EPA reaffirmed the continuing effectiveness of the 1981 policy. 51 Fed. Reg. 3476 (1986).

During the ensuing two years and nine months, EPA took no final action to approve or disapprove the proposed revision.[6] In reliance on the SIP revision and EPA's policy of deferral, General Motors proceeded with its state-approved compliance strategy and spent over $200 million to construct a new, lower-emitting paint facility using the basecoat/clearcoat technology. The old Framingham paint facility was closed on schedule,[7] and there is no dispute that General Motors was—and remains—in full compliance with the revised SIP requirements.

C. Proceedings Below

The Complaint in this action was filed on August 17, 1987, nearly twenty months after the proposed SIP revision was submitted to EPA, and more than a month after the old Framingham paint facility was permanently

[6] On December 2, 1986, more than seven months after the statutory deadline for final decision on the Massachusetts revision, EPA issued a Notice of Proposed Rulemaking, stating that it was *considering* disapproval of the revision. 51 Fed. Reg. 43394 (1986). EPA stated that it was considering disapproving the revision, *inter alia*, because "[e]xtensions of the December 31, 1985 date should instead be obtained through an *enforcement* mechanism." *Id.* at 43395 (emphasis added). This suggested ground for disapproval ignored the fact that the entire purpose of the revision was to defer the deadline, which would render inappropriate any "enforcement" of the pre-existing deadline. The Commonwealth of Massachusetts and General Motors both filed comments in opposition to the proposed disapproval. Eight more months then passed before EPA brought this suit—still without taking final action on the revision.

[7] In fact, General Motors closed the old lacquer paint facility on July 7, 1987, more than a month before the Commonwealth's revised deadline. J.A. 23.

shut down.[8] The Complaint sought civil penalties for violation of the 1985 deadline in the original SIP. The complaint also requested injunctive relief.[9] The Complaint made no mention of the Commonwealth's revision of that SIP deadline; nor did it mention that, despite the passage of nearly two years, EPA had still not taken final action on that revision.

On September 18, 1987, General Motors moved for summary judgment. J.A. 14. Relying principally upon the Fifth Circuit's holding in *American Cyanamid Co.* v. *United States*, *supra*, General Motors asserted that EPA's failure to act upon the proposed SIP revision within the four-month statutory period barred it from bringing an enforcement action inconsistent with that revision. On May 16, 1988, the District Court granted summary judgment to General Motors. The District Court found that conditioning enforcement upon EPA's compliance with the four-month deadline was appropriate on several grounds, including the fact that EPA had not taken final action:

> "First, the EPA always holds the ultimate trump card: it may at any time during or after the allowed four month period reject the proposal and invoke enforcement proceedings under the original SIP. Second, it strains credulity that truly important or controversial SIP revisions cannot be effectively identified early on in the process and scheduled for expedited review. . . . Third, a period any greater than four months would

[8] On August 14, 1986, prior to taking action on the proposed SIP revision, EPA issued a Notice of Violation (a statutory prerequisite to the initiation of an enforcement action) for violation of the original 1985 deadline.

[9] EPA later withdrew its request for injunctive relief and does not dispute that the painting facility at issue has been permanently closed. *See* First Amended Complaint, J.A. 112. Accordingly, the relief that EPA currently seeks in this case is past penalties for alleged violations of the old SIP requirements for the period before the facility was closed.

> leave both the states and the affected industries in an unjustifiable state of limbo. For an indefinite period, the state would be unable to act to balance dictated national priorities with the interests of its citizens and industries as the Clean Air Act intended. And the industries themselves, though fully in compliance with state law, would in some instances face the Scylla and Charybdis choice between ceasing operations now, or possibly being forced out of business by heavy fines later."

Slip op. at 7, J.A. 124.

EPA appealed the district court's decision. On September 16, 1988, the very day that EPA filed its brief in the Court of Appeals, it published a final notice disapproving the SIP revision. 53 Fed. Reg. 36011 (1988). At that point, of course, the SIP revision had become moot for all practical purposes except EPA's enforcement action.[10] On June 7, 1989, the First Circuit reversed the district court's decision and remanded for further proceedings.

The First Circuit agreed with the district court that the Clean Air Act imposes a four-month deadline on EPA review of SIP revisions. 876 F.2d at 1066. The court noted that it is unlikely that Congress "intended for the states' legitimate policy choices to be held hostage to EPA's schedule," and that the *American Cyanamid* rule provides EPA with the greatest incentive to complete its review within four months. *Id.* at 1066-1067. The First Circuit nonetheless held that that EPA may bring an enforcement

[10] General Motors has filed a request for reconsideration with EPA, pointing out technical and legal deficiencies and irregularities in the disapproval decision. General Motors also filed a petition for review of the decision in the Court of Appeals. General Motors v. United States, No. 88-2123 (1st Cir). That appeal has been stayed by the First Circuit pending EPA action on the request for reconsideration—and, of course, the final decision in this case, either of which, if decided in General Motors' favor, would render the appeal moot.

action. It concluded, without citing any factual support, that EPA would frequently miss the deadline even with the incentive of an enforcement bar, and held that an enforcement bar was "too drastic." *Id.* at 1067.[11]

The First Circuit suggested a different, "two-fold" remedy for EPA's failure to observe the four-month deadline. First, the affected source may file suit in federal district court under 42 U.S.C. § 7604(a)(2) to compel EPA to act on the SIP revision. *Id.* Second, when EPA brings an enforcement action, the district court may consider, in assessing penalties, the reasonableness of the Agency's delay and the resulting prejudice, if any, suffered by the company. *Id.* at 1068. The Court expressed the hope that these remedies would "induce prompt EPA action and thus ensure that the interests of the states need not yield too far." *Id.* For the reasons set forth below, the First Circuit's approach is inconsistent with the primary role of the states in establishing SIPs under the Act, will not sufficiently induce EPA to meet the four-month deadline, and is more intrusive on EPA and the courts than the enforcement bar adopted in *American Cyanamid*.

SUMMARY OF ARGUMENT

In enacting the Clean Air Act, Congress created an "experiment in federalism" that was designed to achieve national standards through state regulation. *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). Under the Act, EPA's role is significant but limited. The Agency promulgates the national standards and supervises state achievement of those standards, but the development and enforcement of specific emission limitations to achieve those standards is left primarily to the discretion of the states.

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[11] The First Circuit indicated that it would be receptive to the *American Cyanamid* remedy if it were certain that EPA could review SIP revisions within four months. 876 F.2d at 1067.

The statute contains a series of very specific substantive and procedural requirements that are designed to create and maintain the proper balance of state and federal authority in the "partnership" between EPA and the states. Among these requirements is a requirement that revisions to SIPs promulgated by the states be acted on by EPA within four months. EPA has regularly, as a matter of policy as well as practice, failed to comply with this requirement.[12] Instead, the Agency has claimed the right to ignore state-promulgated SIP revisions for extended periods of time and to proceed with enforcement actions against companies who have acted in good-faith compliance with the revised SIP.

This policy and practice on the part of EPA seriously upsets the careful balance of state and federal authority created under the Act. The rule adopted by the Fifth Circuit in *American Cyanamid Co.* v. *EPA* is a reasonable, limited, and relatively nonintrusive remedy for EPA's failure to act promptly on SIP revisions. The Fifth Circuit's approach gives EPA a choice between completing its review of a SIP revision within four months, as the statute requires, or foregoing, during the pendency of EPA delay, any enforcement action that would be inconsistent with that revision. This is the only remedy that maintains the balance of authority between the states and the federal government as intended by Congress.

Alternative remedies, including those suggested by the First Circuit in this case and by the government, are not effective to redress the imbalance of state and federal authority that EPA creates by not acting promptly upon SIP revisions. Since these remedies leave EPA free to ignore pending SIP revisions in pursuing its enforcement strategy, they create little incentive for the Agency to act on revisions promptly. The alternative remedies also fail

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[12] See pages 28-31 below.

to take into account the extent to which EPA's insistence on enforcement, where it has failed to act on a pending SIP revision, threatens to undermine the integrity of the SIP review process itself by commingling EPA's enforcement and SIP review functions. Moreover, these remedies would inevitably involve the courts in a constant stream of burdensome and unnecessary litigation over the management of EPA's SIP review program and the "reasonableness" of the delays experienced in particular cases.

ARGUMENT

I. THE REQUIREMENT THAT EPA ACT UPON SIP REVISIONS WITHIN FOUR MONTHS IS AN INTEGRAL PART OF THE STATUTORY SCHEME DESIGNED TO PRESERVE THE PRIMARY ROLE OF THE STATES.

The First Circuit held that EPA must act on SIP revisions within four months, and properly rejected the government's position that EPA may act on SIP revisions at its sole convenience.[13] However, the First Circuit failed to relate the four-month rule to EPA's secondary role in the SIP process and erroneously assumed that the deadline is unrealistic. Review of the statutory and policy basis for the four-month rule is important to an understanding of the reasons why the remedy fashioned by the First Circuit is insufficient, and why a temporary bar on enforcement is necessary.

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[13] In its opposition to General Motors' petition for certiorari, EPA stated that it reserved the right to challenge the existence of the four-month rule should this court grant certiorari. Brief for the United States in Opposition at 8 n.1 (November 1989). However, since EPA did not itself petition for review, and since that issue was not presented in General Motors' petition, such a right was not EPA's to reserve. *See* Sup. Ct. Rule 24.1(a). Moreover, as discussed below, the Court of Appeals' decision on this point is clearly not "plain error . . . evident from the record," and thus is not properly raised here at this point. *Id.*

A. The Statute Requires EPA To Act Upon SIP Revisions Within Four Months.

We begin with the language of the statute. Section 110(a)(2) of the Act, as noted above, establishes a detailed list of substantive and procedural requirements governing EPA's review of SIPs. 42 U.S.C. § 7410(a)(2). This provision requires EPA to approve, within four months, any SIP that provides for the attainment and maintenance of the national air quality standards and fulfills other technical and procedural requirements. Congress anticipated that the design and implementation of SIPs would be a continuing process, and thus provided in § 110(a)(3) of the Act for the revision of SIPs by the states. 42 U.S.C. § 7410(a)(3).

This authority for SIP revisions does not contain a separate list of requirements for EPA approval. Instead, it simply provides that EPA "shall approve any revision of an implementation plan [if the Administrator of EPA] determines that it meets the requirements of paragraph [§ 110(a)(2)] and has been adopted by the State after reasonable notice and public hearings." *Id.* Section 110(a)(2) requires EPA action on SIPs within four months. Although there is no express deadline in § 110(a)(3) for EPA action on SIP revisions, the express incorporation of the substantive and procedural requirements of § 110(a)(2) makes it evident that Congress intended the four-month time limit for action on SIPs to apply to SIP revisions as well.[14] In short, all of the requirements of § 110(a)(2), including the four-month rule, apply with equal force to EPA review of SIP revisions under § 110(a)(3).

There is no reason to believe that Congress regarded the expeditious approval of SIP revisions to be any less

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[14] Further support for this conclusion is found in 42 U.S.C. § 7410(g), which discusses circumstances in which EPA has not acted on a SIP revision designed to prevent plant closings "within the required four month period." *See* note 34 below.

important than the approval of original SIPs. As this Court stated in discussing section 110(a)(3) in *Train*, *supra*:

> "Far from evincing congressional intent that the Agency assume control of a State's emission limitations mix once its initial plan is approved, the revision section is to all appearances the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards."

421 U.S. at 80. The Court pointed out that the statute "left to the States considerable latitude in determining specifically how the standards would be met. This discretion includes the continuing authority to *revise* choices about the mix of emission limitations." *Id.* at 87 (emphasis added).

All of the courts of appeals that have had occasion to address this issue, including the decision below, have concluded that the four-month rule applies to SIP revisions as well as to original SIPs. *American Cyanamid Co.*, *supra*; *Duquesne Light Co.* v. *EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983); *Council of Commuter Organizations* v. *Gorsuch*, 683 F.2d 648, 651-52 (2d Cir. 1982); *Council of Commuter Organizations* v. *Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *United States* v. *Alcan Foil Products*, 889 F.2d 1513 (6th Cir. November 21, 1989).[15] EPA's position that it may act on SIP revisions at its convenience is thus contrary to the unanimous weight of judicial authority.

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[15] *See also Sierra Club* v. *EPA*, 719 F.2d 436, 469 (D.C. Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984). In a one-line dictum in a footnote, the Sixth Circuit previously suggested that the four-month rule might not apply to SIP revisions. *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1182 n.1 (6th Cir. 1985). However, in its recent opinion in *Alcan Foil Products*, *supra*, the Sixth Circuit disavowed that dictum and held that the four-month rule does apply to SIP revisions.

B. The Four-Month Rule Serves As An Important Check On EPA Efforts To Run State Programs And Acts To Preserve The Primary Role Of The States.

A fundamental problem with the First Circuit's decision is its assumption that the four-month rule is simply a procedural device, and that a judicially determined "reasonableness" test should be substituted for the provision enacted by Congress. There is no discussion in the First Circuit's decision of the function of EPA's review, and the court thus failed to grasp the rationale for the enforcement bar in *American Cyanamid*. One or two years might be a reasonable time for review if EPA were supposed to be undertaking a comprehensive review of all of the details of a SIP submission. However, that is not the role intended by Congress. Instead, Congress gave EPA a limited role in reviewing SIPs and specified four months as a reasonable time for EPA to exercise that function. Allowing EPA an open-ended review of SIPs gives the Agency a licence to ignore state policy choices and to frustrate the intent of Congress.

In order to ensure that state prerogatives are given full effect, Congress has carefully limited EPA's ability to interfere with a State's SIP and SIP revision by (1) requiring final EPA action within four months, and (2) explicitly limiting the grounds upon which EPA may decline to approve a SIP or SIP revision. 42 U.S.C. § 7410(a)(2), (3); *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 79.[16] The four-month rule must thus be viewed in

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[16] The legislative history indicates that Congress regarded time limits on EPA's review of SIPs as important to the efficient and expeditious attainment of air quality goals. *See, e.g.*, S. Rep. No. 1196, 91st Cong., 2d Sess. 21 (1970), *reprinted in* 1 U.S. Senate Committee on Public Works, *A Legislative History of the Clean Air Act Amendments of 1970*, at 421; *see also* 1 *1970 Legislative History*, at 385 (Senate debate).

the context of broader Congressional concern as to EPA's limited role.

The legislative history of the 1977 amendments to the Act underscores the intent of Congress to preserve the "primary responsibility" of the states. 42 U.S.C. § 7401(a)(3). The Senate Report states that Congress was concerned with the need to augment the "authority" and "responsibility" of state and local air pollution control programs.[17] States and localities are given "broad discretion to make decisions" within the framework of national policy. S. Rep. No. 95-127, *supra*, at 10. The report also stresses that the "Federal role must be one of support rather than control. The Federal Government does not and will not have the resources required to do an effective job of running" state air pollution control programs. *Id.* The report concludes that EPA will "protect and enhance air quality" more by fulfilling its "support" role rather than by trying to run state programs. *Id.*

Numerous decisions by this Court and lower federal courts have underscored the primary role of the states in developing and implementing SIPs. This Court held in 1975 that "[t]he Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2). . . ." *Train* v. *Natural Resources Defense Council*, *supra*, 421 U.S. at 79. In *Union Electric Co.* v. *EPA*, 472 U.S. 246, 265-67 (1976), the Court again emphasized the primary role of the states in establishing and implementing regulations under the Act, holding that economic and technological issues should be addressed to the state agency formulating the plan, not to EPA.

[17] S. Rep. No. 95-127, 95th Cong., 1st Sess. 10 (1977). The 1977 House report also stressed that one of the Act's principal purposes was "to give the States more flexibility in determining how to protect public health while still permitting reasonable new growth." H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 213 (1977). Similar views were expressed during debate on the 1970 amendments. *See, e.g.*, 1 *1970 Legislative History* at 113, 127.

Since this Court's decisions in *Train* and *Union Electric Co.*, the lower courts have consistently underscored the importance of the states' role as primary designers and implementers of regulations under the Act.[18] The Eighth Circuit succinctly summarized the federal-state division of authority under the Act:

> "[T]he Clean Air Act creates a partnership between the states and the federal government. . . . The federal government through the EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through state implementation plans and timetables for compliance. . . . *The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the States.*"

Bethlehem Steel Corp. v. *Gorsuch*, *supra*, 742 F.2d at 1036 (emphasis added).

C. EPA's "Pocket Veto" Of A SIP Revision Frustrates The Statutory Scheme.

The division of federal and state authority in the Act is embodied in the specific and detailed limits on EPA's authority to interfere in a state's policy choices concerning air quality control. The statute does *not* permit EPA to write SIP requirements itself, either directly or indirectly, through manipulation of the review process. EPA's supervisory authority under the Act is limited to review of

[18] *See, e.g., Concerned Citizens of Bridesburg* v. *EPA*, 836 F.2d 777, 780-81 (3d Cir. 1987); *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1148 (7th Cir. 1983); *Florida Power & Light Co.* v. *Costle*, 650 F.2d 579, 588 (5th Cir. 1981); *Mision Industrial, Inc.* v. *EPA*, 547 F.2d 123, 129 (1st Cir. 1976).

state actions; unless a state fails to promulgate a SIP, EPA is not permitted to promulgate SIP requirements itself.[19] As the Eighth Circuit concisely phrased it, "[t]he state proposes, [and] the EPA disposes." *Id.* at 1036. Under the statute, EPA has only *two choices* in responding to a SIP revision, approval or disapproval. There is no middle course. *Train* v. *Natural Resources Defense Council*, 421 U.S. at 79-80.

By ignoring the four-month rule, however, EPA has effectively created for itself a *third* option, and thus has assumed greater powers than Congress conferred. If EPA agrees with a revision, it approves it. If EPA disagrees with the revision the Agency simply ignores it, often for years at a time.[20] This "pocket veto" power is nowhere authorized in the statute, and it is directly contrary to Congressional intent that the *states*, not EPA, have the authority to choose among alternative regulatory options for implementing the Act. *Bethlehem Steel Corp.* v. *EPA*, 782 F.2d 645, 650 (7th Cir. 1986).[21] Where EPA "pocket

[19] When a state fails to promulgate a SIP (or fails to revise and resubmit a SIP that EPA has validly disapproved), EPA may, after compliance with additional procedural requirements, promulgate a SIP on behalf of the state. 42 U.S.C. § 7410(c). If the Agency finds that an existing SIP no longer satisfies the statute, it may require the state to revise it. 42 U.S.C. § 7410(a)(2)(H).

[20] By delaying action, EPA has effectively imposed on the state its decision to recognize and enforce the original SIP, contrary to the considered choice made by the state to amend the SIP.

[21] In *Indiana & Michigan Electric Co.* v. *EPA*, 733 F.2d 489 (7th Cir. 1984), the State of Indiana promulgated a SIP that included both a stringent ceiling on certain sulfur dioxide emissions and a provision that compliance with the ceiling would be measured through 30-day averaging. EPA approved the emissions limit, but "deferred" action on the averaging provision. The court found that EPA had "effectively disallow[ed] an integral part of a plan provision without determining that the part violates the requirements of the Act." *Id.* at 492. Such an approach, the court held, was inconsistent with the state's entitlement to have its plan evaluated on the merits and in the form submitted.

vetoes" a SIP revision by failing to act upon it for months, or even years, beyond the statutory four-month period, the Agency appropriates for itself the *de facto* power to effectively disapprove a SIP through inaction—all without having to comply with the procedural and substantive limitations on such disapproval that would otherwise apply under Section 110(a)(2) of the Act.[22] In short, pocket vetoes hold the states' legitimate policy choices hostage to EPA's dilatory schedule.

In numerous cases decided since the 1970 amendments to the Act, the courts—including this Court—have stressed that the statute means what it says on the scope of EPA authority in this area, and that the powers expressly granted the Agency under the Act are the *only* ones that it possesses. Thus, for example, this Court held in *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), that EPA may not consider in its SIP review process factors, such as technical feasibility, that Section 110(a)(2) of the statute does not expressly permit it to consider. The courts have also stressed that the provisions of Section 110 are integral to the statutory scheme, and that EPA may not ignore those provisions—or invent new devices—where the effect is to increase EPA's involvement in the promulgation and implementation of SIPs at the expense of the states.[23]

[22] A "pocket veto" of a SIP revision also may have the effect of denying states and interested parties any opportunity for judicial review, since there is arguably no "final agency action" on which review may be sought.

[23] For example, although EPA is permitted under certain circumstances to approve a SIP in part and disapprove it in part, it may not do so where the effect would be to render the approved portion of the SIP more stringent than the state intended. *Bethlehem Steel Corp* v. *Gorsuch*, 742 F.2d at 1037; *Indiana & Michigan Electric Co.* v. *EPA*, 733 F.2d 489 (7th Cir. 1984); *see State of Michigan* v. *Thomas*, 805 F.2d 176, 186 (6th Cir. 1986). If EPA finds that a plan requirement is not sufficiently stringent to achieve national standards, then the Agency must follow the procedures established under the Act for pro-

These decisions, and the mischief created by EPA inaction, underscore the need to ensure that EPA acts on SIP revisions within the four-month statutory period.

II. EPA'S FAILURE TO TAKE PROMPT ACTION UPON A SIP REVISION BARS AGENCY ENFORCEMENT OF INCONSISTENT PROVISIONS OF THE PRE-EXISTING SIP.

Given EPA's obligation to act upon SIP revisions within four months and, as discussed below, EPA's deliberate policy of ignoring this obligation, the question presented is whether EPA should be barred from enforcing pre-existing SIP regulations that the states have revised. This issue has so far been considered by four courts of appeals, which have adopted different approaches to dealing with the problem. We submit that only the enforcement bar adopted by the court in *American Cyanamid* properly implements the statute.

A. Federal Enforcement Of SIP Requirements That A State Has Sought To Change Is Inconsistent With The Primary Role Of The States Envisioned In The Statute.

In *American Cyanamid Co.* v. *EPA*, the Fifth Circuit reviewed an EPA administrative penalty determination under Section 120 of the Clean Air Act.[24] In that case, the State of Louisiana had promulgated a SIP revision in 1982 that would permit American Cyanamid to install advanced

mulgation of a substitute requirement; it may not avoid those procedures through a partial approval that distorts the state's plan to achieve the desired stringency. *Bethlehem Steel*, 742 F.2d at 1035.

[24] Under Section 120, EPA is empowered to impose administrative penalties on noncomplying sources. Section 113 of the Act, under which this action arises, permits EPA to seek civil penalties and injunctive relief through an action in federal district court. The distinction between these two enforcement remedies is not important for purposes of the issues currently before the Court. *See United States* v. *Alcan Foil Products*, *supra*, slip op. at 9-10.

technology and measure its compliance with emission limits on the basis of emissions trading or a "bubble."[25] Cyanamid agreed to install extra controls beyond those otherwise required on its major sources in return for an exemption for certain minor sources. The net result was a significant reduction in overall emissions. 810 F.2d at 497. EPA never acted on the revision. Indeed, to date the Agency has *still* not taken final action to approve or disapprove that revision. Instead, in 1984 EPA initiated a proceeding against American Cyanamid for failure to comply with the old Louisiana SIP for the minor sources.

The Fifth Circuit held that under these circumstances an enforcement proceeding that simply ignored the SIP revision was inconsistent with the statute. The court found that a bar on enforcement was necessary to preserve the authority of the states under the Act, and that absent such a bar, "EPA loses nothing by its contumaciousness." 810 F.2d at 499. The court therefore held that "EPA may not collect a penalty for the period between (1) four months after a state submits a proposed revision and (2) the date the EPA rejects that revision." *Id.* at 500.

The Fifth Circuit's decision in *American Cyanamid* expressed concern with the impact of EPA's deliberate disregard of the states' prerogatives under the Act:

> "Where, as here, the state has proposed a revision to its SIP which clearly authorizes local businesses to act in accordance with it without running afoul of the Clean Air Act, the interest of the state itself is deeply involved in the required four month approval or disapproval of the proposed revision. It distorts the statutory scheme to place virtually full emphasis upon the business entity involved as a charged "polluter."

[25] *See generally, Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). As in this case, the SIP revision was promulgated in response to a published EPA policy.

> The emphasis of the statute, rather, is upon the important role which the state plays in defining authorized emissions. . . . The issue then is not so much pollution by American Cyanamid but the default of the EPA in carrying out the congressional intent to work in close cooperation with the states in implementing standards and enforcing the Clean Air Act."

810 F.2d at 500. Thus, the court pointed out, the obvious unfairness of the situation to American Cyanamid was almost beside the point:

> "We emphasize the importance of the EPA acting, not for the benefit of American Cyanamid, but for the benefit for the State of Louisiana which is by statute designated to play a significant cooperating role with the EPA."[26]

As the Fifth Circuit recognized, EPA enforcement of a pre-existing SIP that the state has attempted to change is fundamentally inconsistent with Congress's intent that states play the primary role in promulgating and implementing SIP requirements. By simply ignoring the states' changing policy choices embodied in SIP revisions, or delaying until the issue is moot, EPA effectively destroys the statute's carefully crafted balance of state and federal authority.

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[26] *Id.* The Fifth Circuit recently held that a similar bar applies to enforcement of EPA's belated disapproval of a delayed compliance order issued by a state under Section 113(d) of the Act. *General Motors Corp. v. EPA*, 871 F.2d 495 (5th Cir. 1989). In that case, EPA had sought to disapprove an order issued by the State of Texas, even though the statutory deadline for EPA review had long passed, and even though the order itself had ceased to be effective by its own terms. The Fifth Circuit held that belated EPA disapproval of the order under those circumstances could not be effective for purposes of enforcement. The court found that permitting effective EPA disapproval in such a case would interfere with the "authority of the states as the primary regulators of air quality under the Clean Air Act." *Id.* at 499-500.

The court below expressed concern that the Fifth Circuit had struck the wrong balance between the states' interests under the Act and the public's interest in pollution prevention. 876 F.2d at 1067. This concern rests on a misunderstanding of the issue at hand: the question here is not whether the public interest should be sacrificed to some other value, but rather whether the states or EPA have the primary role to identify and effectuate the public interest in the first place. Under the Clean Air Act, this role is given to the states. SIP revisions represent a considered judgment by the state, after the benefit of public hearings, as to the best way to implement the national standards and to serve the public in light of changed circumstances. Thus, in barring enforcement against American Cyanamid the Fifth Circuit did not sacrifice the interest of Louisiana citizens in clean air; it vindicated the right of Louisiana, not EPA, to decide what the public interest was in that situation.[27]

Similarly, in this case, the question is not whether the interest of Massachusetts citizens in clean air should triumph over EPA's procedural misconduct; but rather

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[27] This conclusion is not dependent upon any assumption about the ultimate approvability of the SIP revisions at issue. The State's judgment that *some* change in its SIP is appropriate must be accorded substantial deference. Even if EPA identifies a deficiency in the submitted revision, it does not follow that *any* revision would be invalid and that the State would not be able to amend the revision to meet EPA's concerns. Thus, for example, if EPA had rejected the *American Cyanamid* bubble revision within four months, the State might have been able to repromulgate the revision in a manner that cured whatever deficiency caused EPA's concern.

Similarly, if EPA had rejected the Massachusetts revision promptly, the State and General Motors might have been able to work out an alternative strategy that attained at least some of the benefits of the original revision in a manner acceptable to EPA. By delaying action on the revision until after the revised deadline was long past, EPA deprived the State of these alternatives; indeed, the new paint shop was operational by the time EPA took final action.

whether the Commonwealth of Massachusetts or EPA has the right to decide how that interest in clean air is to be accomplished.[28] If a state is so fundamentally wrong in its judgment on this point that its decision, embodied in a SIP or SIP revision, violates federal requirements, then EPA should disapprove it. But EPA may not simply *ignore* a state's judgment about the interests of its own citizens, or delay its decision until the issue becomes moot.

In earlier proceedings in this case, EPA has expressed concern that industries might seek to circumvent regulatory requirements and deadlines by having state agencies adopt frivolous SIP revisions. This idle speculation, in addition to being insulting to the states, is clearly inconsistent with Congress's own perception and desire that the states be granted considerable deference in their design and implementation of SIPs. EPA's argument on this point displays EPA's own disdain for the states and their ability to make reasoned policy choices in this area. Congress, however, did not agree with this view, and it is Congress's view that must prevail.

B. The Remedy Fashioned By The Fifth Circuit In *American Cyanamid* Is An Appropriate, Non-Intrusive Response To EPA's Failure To Comply With A Mandatory Statutory Requirement.

The Fifth Circuit's remedy in *American Cyanamid* restores the balance of federal and state authority under the Clean Air Act. The key to the Fifth Circuit's approach is its deference to EPA: the court did not require EPA to complete its review of all SIP revisions within four months (although that is what the statute requires), nor did it threaten or impose any sanction against EPA for failing

[28] Massachusetts here decided that the long-term interests of its citizens in improved air quality warranted a temporary compliance extension in return for long-term emissions decreased substantially below that required by 310 CMR 7.18(7).

to meet this obligation as a general matter. Instead, the court simply held that EPA may not combine SIP revision delay with an enforcement action. If EPA wishes to initiate an enforcement action that is inconsistent with a pending SIP revision, then it must first act on the revision. If EPA does not devote resources to timely review of a revision, then it need not do so, as long as it does not try to use its resources instead to bring an inconsistent enforcement action.

Thus, the Fifth Circuit's approach leaves EPA's fate in the Agency's own hands. There is no permanent bar on EPA enforcement (unless, of course, the SIP revision is consistent with the statute and EPA is ultimately obligated to approve it). If EPA wishes to bring an enforcement action that is inconsistent with a pending revision, it simply has to act on the revision first.[29]

Available evidence suggests that the actual increased burden imposed on EPA by the *American Cyanamid* approach is minimal. The Agency has estimated that, of the approximately 350 SIP revisions it currently receives each year from all 50 states, only *nine* are relevant to enforcement actions by the Agency.[30] EPA can hardly argue that

[29] There could, of course, be circumstances under which quick action is required against a source that presents a substantial and immediate endangerment to public health. In such cases, however, Section 303 of the Act expressly grants authority to EPA to seek an emergency restraining order in federal district court. 42 U.S.C. § 7603(a). The penalty provisions of Sections 113 and 120 would not ordinarily be of immediate importance in such a situation. The effect that a pending SIP revision might have in a case brought under Section 303 has not yet been considered by the courts. That issue is certainly not presented in this case, where EPA did not seek to invoke its emergency authority—and clearly could not have done so in any event since the source at issue was already permanently closed at the time the action was brought.

[30] EPA, *Report of Audit: Review of EPA's Process for Approving/Disapproving State Implementation Plans and Revisions*, E1K6*8-11-0045-9100210, at 16 (March 1989) (copy lodged with the Clerk of the Court).

it would be an insurmountable task to identify this handful of revisions, which amounts to less than one SIP revision for each of the ten EPA regional offices, for timely review and action.[31]

Before the First Circuit, EPA argued that the *American Cyanamid* remedy is inconsistent with this Court's decision in *Brock* v. *Pierce County*, 476 U.S. 253 (1986). In that case, the Court held that the Department of Labor's failure to make a finding of misuse of federal grant funds within 120 days of an allegation, as required by the statute, did not bar the Department from later seeking to recover such funds. In this case, there is no dispute that EPA may still disapprove a SIP revision if it fails to do so within four months and that, once it does disapprove the revision, it may then enforce the old SIP prospectively.[32] The *American Cyanamid* remedy is thus entirely different from the one considered in *Brock*: EPA remains free to disapprove the revision, but if it does not act within four months, it may not collect penalties for the interim period.

There is also an important factual distinction between this case and *Brock* arising from the context in which the delay occurred. The Court's opinion in *Brock* did not suggest that the delay in question was the result of anything other than negligence on the part of Department officials. *See* 476 U.S. at 260. Here, in contrast, the delay is not simply the result of negligence by EPA officials; it constitutes the accepted and considered policy of the Agency, which admits that its policy is to ignore the four-month requirement. *See, e.g.*, J.A. 103-11; pages 28-31 below.[33]

[31] EPA has advance notice of SIP revisions when proposed by a state, so in practice the Agency has several months' lead time before the four-month period for EPA review begins to run.

[32] The *American Cyanamid* approach is therefore consistent with this Court's indication in *Train* v. *Natural Resources Defense Council*, *supra*, that a company seeking judicial review of EPA's disapproval of a variance may not rely upon the pendency of such review as a defense to an enforcement action. 421 U.S. at 92. Under the *American Cyanamid* approach, once EPA *does* act to disapprove a SIP revision, it is free to enforce the old SIP prospectively, even if the State or a private party seeks judicial review of that disapproval.

C. The Fifth Circuit's Approach Properly Implements Congress's View Of The "Reasonable" Time For EPA Review.

The First Circuit declined to follow *American Cyanamid* because it assumed, without citing any factual support, that EPA would not be able to comply with the four-month rule. 876 F.2d at 1067. EPA's failure to meet the four-month deadline is not simply a matter of inadvertence or inability, however, but rather a deliberate policy of indifference to state policy choices and a decision to use the SIP review process to assert control over state decisions in a manner that Congress rejected. The problem stems not from the limited period that EPA is given to fulfill its statutory role, but from EPA's efforts to expand its role into one that cannot be fully performed within the statutory period.

The First Circuit's approach in this case thus constitutes a deliberate second-guessing of Congress's decision on this issue.[34] The First Circuit assumed that the four-month rule

[33] Moreover, in *Brock*, the Department's delay in seeking recovery had no substantive impact on whether the funds were in fact misspent and should be recovered. Here, in contrast, EPA is seeking penalties for a violation that arguably would not have occurred at all if EPA had acted in a timely manner. Had EPA acted to disapprove the Massachusetts SIP revision within four months, both the Commonwealth and General Motors would have had an opportunity to explore other alternatives that might have been acceptable to EPA. By delaying to the point where the issue became moot, EPA completely eliminated this opportunity.

[34] The First Circuit incorrectly suggested in a footnote of its opinion that the *American Cyanamid* approach might render § 110(g) of the Act superfluous. 876 F.2d at 1069 n.6. Section 110(g) of the Act, 42 U.S.C. § 7410(g) allows a state to issue temporary emergency suspen-

embodies an error on the part of Congress and that EPA should be afforded more time by the courts. Yet the court cited no authority for this assumption, and none exists. When the statute was enacted, Congress evaluated the limited supervisory task that it was assigning to the Agency in evaluating a SIP or SIP revision, and determined that four months was a reasonable period of time to perform that task. As a matter of law, Congress has already established four months as a "reasonable" time for EPA to act. Any longer period of time is *per se* unreasonable.

EPA's failure to comply with the four-month rule in reviewing the Massachusetts SIP revision at issue here is not an isolated case. As discussed above, there have now been several litigated cases in which EPA has brought enforcement actions that are inconsistent with SIP revisions that, at the time the suits were brought, had been pending before EPA for many months, if not years.[35]

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sions of SIP requirements where necessary to prevent a plant from closing. This section envisions a situation where the state has adopted a SIP revision to provide relief to the plant, and the state concludes that a suspension of the previous SIP is appropriate without waiting for EPA to act on the revision "within the required four month period." *Id.* The *American Cyanamid* remedy, in contrast, would bar EPA enforcement only after the four month period expires, and thus would not make § 110(g) superfluous.

The First Circuit apparently interprets § 110(g) as requiring that the state wait until the four month period for EPA action on the SIP revision expires before issuing the suspension. This interpretation is not well founded, given the fact that the suspension is only effective under § 110(g)(2) for four months. Moreover, Congress obviously contemplated that any rare delay that occurred before EPA completed its review would not last beyond the four month suspension. Otherwise, § 110(g) would only serve to delay economic dislocations rather than preventing them as Congress intended.

[35] *See, e.g., American Cyanamid Co.* v. *EPA*, *supra* (SIP revision submitted for EPA review more than two years before enforcement action filed; no final action ever taken on revision); *United States* v. *Alcan Foil Products*, *supra* (SIP revision submitted for EPA review one year before enforcement action filed; EPA disapproved revision more than a year later, after district court granted summary judgment for defendant).

Moreover, despite the unanimous holdings of the courts that the Agency must complete its review of SIP revisions within four months, the Agency in fact makes no attempt to do so. EPA has adopted an internal policy that schedules review of SIP revisions to be completed in *fourteen* months. J.A. 103-11.[36] And as a practical matter, EPA frequently fails to meet even that self-extended deadline: the Agency recently published data showing that its *average* time for review of a SIP revision is approximately 30 months, and many revisions have been pending far longer.[37]

EPA has admitted publicly that the substantial delays encountered in its review of SIP revisions is largely the result of the Agency's own expansive view of its role in the review process, which infringes on state prerogatives. *See* EPA, *State Implementation Plan Processing Reform*, *supra*. Thus, for example, many substantial delays are attributable to the Agency's "inordinate concern for individual actions" and its insistence that SIP requirements "be similar State to State and source to source." 54 Fed. Reg. at 2216-17. This EPA-imposed requirement of consistency is, of course, directly *inconsistent* with the statute, which contemplates that, so long as national standards are met, states may apply *different* requirements to sources within their boundaries, depending upon each state's own environmental, economic, social, and political needs. Thus, in many cases, EPA delays its review of SIP revisions for

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[36] *See also State Implementation Plan Processing Reform*, 54 Fed. Reg. 2214 (1989).

[37] *See* EPA, *Report of Audit*, *supra*, at 8, 20-21. The experience of the Commonwealth of Massachusetts in this case was therefore apparently a typical one: EPA took approximately 33 months to complete its review of the Massachusetts revision involving the Framingham facility.

lengthy periods in order to ensure a consistency that Congress intentionally did *not* require.

Another important source of EPA delay is its deliberate practice of "holding," often for years, final action on pending SIP revisions pending formulation of new or revised EPA policies relevant to the revisions.[38] The Audit Report by EPA's Inspector General reveals that this was the cause of the delay at issue in the *American Cyanamid* case:

> "EPA published an interim policy in December 1982 for reviewing requests for emissions trading. However, a final policy was not developed until August 1986. In the interim, the review of SIP revisions requesting emissions trading was put on hold."[39]

In the case of American Cyanamid, the Agency has *still* not taken final action on the revision, which was submitted more than seven years ago. Obviously, Congress did not intend that EPA development of policies and guidance documents to assist the states would take precedence over timely action on the SIP revisions themselves.[40]

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[38] A related problem has been the "moving target syndrome," under which EPA review of a SIP revision that was consistent with EPA policy at the time it was proposed takes so long that the revision becomes inconsistent with a new or revised Agency policy. *Id.* at 2216. Although it has not yet been fully developed in the record, it appears that General Motors may well have been the victim of such a change in EPA policy. The Agency's 1981 policy clearly contemplated—and indeed encouraged—revisions of the type promulgated by Massachusetts in this case. Yet, as EPA stated in its proposed disapproval notice in this case, the Agency apparently later decided that it preferred to address delays in automobile painting emission requirements through an enforcement mechanism. *See* note 6 above.

[39] EPA, *Report of Audit, supra* at 12.

[40] EPA has also identified management problems, including excessive bureaucratic review requirements for even simple SIP revisions, a lack of accountability within the Agency for timely processing of SIPs, and the absence of an adequate system for tracking revisions through the process, as contributing to delays. 54 Fed. Reg. at 2216-17; EPA, *Report of Audit, supra*, at 7-9.

EPA has conceded that the lengthy delays in its review of SIP revisions seriously impede many of the fundamental goals of the Clean Air Act:

> "The EPA is concerned that uncertainty and excessive delays in processing SIPs frustrate the development of an optimum State/Federal partnership, cause confusion for sources regarding applicable regulations, and generally dampen initiative in State regulatory programs."

54 Fed. Reg. at 2214. Congress clearly did *not* intend EPA to undertake the detailed, highly bureaucratized review of SIPs that EPA's extended internal schedules now contemplate. The First Circuit's proposed remedy ultimately requires an evaluation by the district court of what constitutes a "reasonable" time for EPA review of SIP revisions. In suggesting that the district court should evaluate this issue on a case-specific basis, the First Circuit has all but ignored the fact that the issue is already decided by the statute itself.

III. ALTERNATIVE REMEDIES SUGGESTED BY EPA AND BY THE COURT BELOW ARE INADEQUATE, INTRUSIVE, AND CUMBERSOME.

The *American Cyanamid* remedy is most consistent with Congressional intent. The remedies proposed by the court below are entirely ineffective as meaningful remedies for EPA's failure to comply with the four-month rule, and are substantially inferior to the *American Cyanamid* remedy in achieving this goal. In addition, these alternative remedies would inevitably require substantial and detailed involvement by the lower courts in the day-to-day functioning of the Agency.

A. Alternative Remedies Are Insufficient To Give Full Effect To The Primary Role Of The States Under The Act.

The alternatives that have been suggested to the *American Cyanamid* remedy simply do not restore the primacy

of state authority intended by Congress that is stripped away by EPA's noncompliance with the four-month rule. The First Circuit's "penalty reduction" approach would consider the "reasonableness" of the delay and the resulting prejudice to the *defendant*, but would give no consideration to the serious prejudice to the state's interests resulting from EPA's disregard of the state's policy choices.[41] The remedy adopted by the Fifth Circuit in *American Cyanamid* is the only remedy that provides EPA a real incentive to act in a manner that respects and gives effect to the role of the states under the Act.

EPA's policy of delaying action on SIP revisions for extended periods of time, coupled with its enforcement of existing SIPs, inevitably has a serious negative impact on the states' ability to ensure that their SIPs reflect developments and changes in state priorities. Deferrals such as those involved here call for "hard choices, choices which the state regulator must make in the first instance." *General Motors* v. *EPA*, *supra*, 871 F.2d at 504. With no prospect that EPA will even try to act upon revisions in a timely manner, the states' practical ability to revise their SIPs is seriously impaired. This is particularly the case where the revision involves a short-term change in the SIP, such as the extension involved here. EPA has conceded that it "should not delay action on a SIP revision in such a manner as would thwart the state's intent in

[41] The alternative "remedy" suggested in the *Duquesne* decision—mere deferral of enforcement action with retroactive penalties if the revision is ultimately disapproved—does even less to address the needs of the states. As the Fifth Circuit pointed out in *American Cyanamid*, "the *Duquesne* holding provides little or no incentive to the EPA to abide by § 7410's four-month rule; the EPA loses nothing by its contumaciousness." 810 F.2d at 499. The states, on the other hand, lose just as much as if the courts ignored EPA's disregard of the four-month rule altogether. As long as EPA has no incentive to speed its review process, the ability of the states to implement changes in their plans will be effectively frustrated.

requesting the SIP revision."[42] Although EPA has given lip service to the need for timely action, the Agency's practice is in reality a far different matter. *See* pp. 28-31 above.

As discussed above, Congress clearly intended that regulation under the Clean Air Act be a flexible, continuously evolving process. The appropriate regulatory strategy for any particular source in any given location will inevitably be the function of a number of factors, including the level of emissions from that source and from other sources, the overall air quality in the area, the availability of control technology, the cost of that technology, the economic importance of the source's operations to the state, the environmental impacts of alternatives, and a host of other environmental, social, political, technological, and economic factors. Virtually all of these factors are subject to change over time. By denying the states an effective ability to revise their SIPs to reflect such changes, EPA denies the states the ability to tailor their SIPs to their own particular circumstances, as Congress intended. Moreover, if the courts were to permit EPA to proceed with enforcement actions that are inconsistent with SIP revisions, then companies will in the future decline to accept and act upon changed state requirements embodied in SIP revisions during the period (often years) of EPA review.

The First Circuit's alternative remedies condone EPA's delay in reviewing revisions and give states a disincentive to attempt innovative control strategies or to experiment with stringent, "technology-forcing" requirements. As this Court recognized in *Union Electric Co.*, *supra*, the question

[42] EPA, *Approval and Promulgation of Implementation Plans; Massachusetts Ozone Attainment Plan; Control of Gasoline Volatility*, 54 Fed. Reg. 19173, 19182 (1989) (declining to delay final action on SIP revision to permit further review in light of recently promulgated federal rules, since delay would interfere with state's intended date of effectiveness).

of technological feasibility of control requirements and the appropriate role of feasibility and cost in the adoption of such requirements is the province of the states under the Act. In both the *GM* and *Cyanamid* cases, for example, the controls installed under the SIP revisions resulted in lower emission levels than required under the initial SIPs. Normally, a state would be encouraged to experiment with such requirements. Yet if a state lacks the practical ability to change its SIP requirements, it will be reluctant to adopt such novel provisions. This, again, is directly inconsistent with Congress's intent in enacting the statute. *See Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 256-64.

B. EPA's Failure To Take Prompt Action On SIP Revisions Subjects Industry To Conflicting Federal And State Regulatory Requirements And Provides A Serious Disincentive To The Adoption Of Innovative Pollution Control Strategies.

EPA's SIP review delays also have seriously negative impacts on regulated industries. Probably the most important impact stems from the uncertainty caused by EPA's delays. *See* EPA, *State Implementation Plan Processing Reform*, *supra*, 54 Fed. Reg. at 2214. When a state revises its SIP, that revision immediately has the force of state law. The revision acquires the force of federal law only when EPA approves it. When EPA delays for an extended period its action on a SIP revision, therefore, the result is considerable uncertainty as to what the applicable standards actually are and will be.[43]

[43] Under the statute, this uncertainty can exist for up to four months in any event, since EPA is given that long to complete its review of the proposed revision. However, in the vast majority of cases four months of uncertainty is a relatively minor inconvenience compared to the years of uncertainty that EPA actually imposes by its lengthy delays in reviewing SIP revisions.

This situation also creates a strong potential for anomalies in enforcement. Since a revised SIP changes state law, a state that adopts a revision may enforce only the revised SIP. EPA's position, on the other hand, is that it may continue to enforce the old SIP, regardless of whether a violation exists under the revised SIP.[44] It is absurd to suggest that Congress intended that a Clean Air Act SIP, which is the product of joint federal and state effort under the same statute, would be enforceable in one form at the federal level and in an entirely different form at the state level. *See Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d at 1151. Indeed, depending upon the nature of the revision and of the original SIP requirements, it is possible for a regulated entity to be faced with *inconsistent* federal and state requirements—and to be subject to enforcement action by either EPA or the state no matter what it does. *See General Motors Corp.* v. *EPA*, 871 F.2d 495, 501 (5th Cir. 1989).[45]

[44] In the case of delayed compliance orders, which, like SIP revisions, are promulgated by the states and then approved by EPA, the Agency has affirmatively encouraged the states to prosecute sources for noncompliance with the requirements of such orders during the period of EPA review. *See General Motors Corp.* v. *EPA*, *supra*, 871 F.2d at 501 (*citing* Memorandum from Marvin B. Durning, Assistant Administrator for Enforcement, to Regional Administrators, Regional Enforcement Directors (July 27, 1978)).

[45] Thus, for example, if the federally-approved SIP requires a source to install Equipment A to control emissions, and a SIP revision is adopted (but not acted on by EPA) that requires Equipment B to be installed, the source could be sued by the State if it fails to install Equipment B and sued by EPA if it fails to install Equipment A. This would obviously be an anomalous situation. If the two types of equipment are mutually exclusive, the source will be in a "no win" situation; its only alternative will be to shut down altogether. In this case, since the two alternative approaches embodied in the original and revised Massachusetts SIP requirements were economically (although not technically) inconsistent, this was essentially the situation in which General Motors found itself. The Commonwealth and GM were entitled to rely

Without an effective remedy for EPA's failure to take timely action on a SIP revision, industries will be unwilling, if not simply unable, to undertake improved compliance strategies of the type undertaken by General Motors in this case. Although there were competitive as well as environmental reasons underlying General Motors' decision to switch to the basecoat/clearcoat system, it would clearly have been cheaper in the short term for General Motors simply to add controls to the old facility and meet the old SIP deadline. If General Motors had known that EPA would "pocket veto" the SIP revision, and that it might be subject to substantial penalties for adopting the state-approved compliance strategy, it might well have selected this less expensive approach. The First Circuit's holding will discourage companies in a similar position from using innovative technologies.

Perhaps the greatest anomaly in enforcement is the Agency's attempt to seek penalties for conduct that EPA itself does not necessarily believe to be "wrong." The *American Cyanamid* case itself is a classic example of this situation. In that case, EPA had been unable to make up its mind whether the "bubble" that the company was relying upon was or was not consistent with the Act, even though the revision incorporating that bubble had been pending before the Agency for more than two years. Yet EPA asked the court to confirm substantial penalties against the company for relying upon the bubble. In other words, EPA asked the court to agree to penalize the company for doing something "wrong" even though EPA itself could not make up its mind whether the company's conduct was "wrong" at all. Indeed, if EPA had had its way in that case, American Cyanamid would by now have been assessed the penalty and paid it,[46] even though EPA has

on EPA's published 1981 policy absent timely EPA action on the SIP revision.

[46] The decision below, coupled with EPA's enforcement policy, may also coerce companies into settling unjustified enforcement actions.

still not decided whether the company's bubble is or is not consistent with the Act.

C. A Bar On Enforcement Actions That Are Inconsistent With Pending SIP Revisions Upon Which EPA Has Failed To Act Within Four Months Is Necessary To Preserve The Integrity Of EPA's SIP Review Process.

The *American Cyanamid* remedy is also important as a mechanism to ensure the fair and even-handed review of SIP revisions by EPA. As the Fifth Circuit pointed out, it will be difficult, if not impossible, for EPA to review a SIP revision objectively when it has already initiated an enforcement proceeding. Once the Agency has gone so far as to initiate an enforcement action in support of the pre-existing SIP, the pressure to reach a consistent result in reviewing a concurrent SIP revision will be overwhelming for even the most well-meaning EPA officials. As a result, there is a substantial danger that permitting such enforcement actions to proceed "may encourage the EPA to reject [SIP] revisions that it should accept." 810 F.2d at 499. As a practical matter, once the enforcement proceeding has begun, officials will inevitably be "reluctant to approve [a state's] revision and admit that [the company] is not liable for noncompliance after all." *Id.* In those circumstances, "EPA's even-handed administration of the Act" will be open to substantial question. *Id.*; *see also General Motors Corp.* v. *EPA*, 871 F.2d 495, 501 (5th Cir. 1989).[47]

[47] The First Circuit suggested in its opinion in this case that this argument "proves too much," and that "the potential for Agency bias results, not from the Agency's failure to complete its review within four months but from Congress' decision to assign the EPA the responsibility for both reviewing plans and enforcing them." 876 F.2d at 1068-69. Congress obviously did not foresee (1) that the "Chinese wall" between EPA's regulatory and enforcement branches would be torn down by EPA's policy of putting the enforcing cart before the regulatory horse, or (2) that EPA would act in a way that undermines the

This concern is particularly strong in this case. After July and August 1987, when the old Framingham paint facility shut down and the new deadline established by the SIP revision passed, the revision ceased to have any relevance whatsoever in the regulatory context. After that point, the revision, and EPA's review of it, had continued relevance *only* to this enforcement action which itself was filed after the regulatory issue had become moot.[48] EPA's act of publishing its final disapproval the day its brief was due and filed in the First Circuit unmasked its pretense of objectivity; this action served no purpose except to support the Agency's enforcement efforts in this proceeding.

Because the SIP revision in this case was by its nature temporary, EPA's delay raises special concerns. If EPA acts promptly, it must consider the merits of the SIP revision and, if it has objections, advise as to what might be done to meet these objections. If EPA fails to act, the state and the company are "without guidance or options."

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primary role of the states.

There is a very significant practical difference between the potential internal tensions in EPA's role that the First Circuit identified and the even stronger tensions that are created when EPA commits itself publicly to an enforcement action without first completing a regulatory decision that might have the effect of mooting that action. In such a case, there will be extremely strong pressure on Agency officials to disapprove the revision in order to avoid subjecting the Agency to criticism for wasted resources and unfair harassment of the regulated community.

[48] EPA made it clear as early as December 1986, when it published its Notice of Proposed Rulemaking, that it was considering the Massachusetts revision and the Agency's enforcement strategy as a single package and was inclined to the view that "[e]xtensions of the December 31, 1985 date should instead be obtained through an enforcement mechanism." 51 Fed. Reg. 43394, 43395 (1986). The Agency thus conceded that its regulatory and enforcement decisions were part of a single, combined strategy in which enforcement would be given priority. At that point, objective review of the revision became a practical impossibility.

General Motors v. *EPA*, *supra*, 871 F.2d at 500. When EPA "dawdles not only beyond" the statutory four month period but, as happened here, "past the expiration date of [the SIP revision], the EPA's review of the [SIP revision] necessarily takes on an abstract, almost counterfactual character." *Id.* Once the Agency has decided to pursue enforcement, EPA is likely to disapprove the SIP for reasons that are simply window dressing for its enforcement action. The filing of an enforcement action before the regulatory process has been completed totally skews the regulatory process. *Id.* at 501.

One need not presume actual misconduct on the part of EPA officials in order to recognize that such a situation seriously undermines the federal-state partnership upon which the Clean Air Act is based. Where, as here, EPA's delay continues for so long that completion of the review process has no practical purpose other than support of the Agency's commitment to an enforcement action, there will, at minimum, inevitably be a strong appearance of impropriety. "Common sense suggests that something is amiss when an agency purports to disapprove an expired order after the fact."[49] Such an appearance undermines confidence of the public and the regulated community that SIP revisions will be reviewed by the Agency on their merits, unprejudiced by extraneous Agency priorities. An appearance of bias may discourage states from revising SIPs containing innovative solutions to attain air quality standards. By creating the appearance that its review is in fact influenced, if not governed, by such extraneous factors, EPA does a substantial disservice both to its state partners and to the public.

The Fifth Circuit's approach in *American Cyanamid* serves to further the "even-handed administration of the

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[49] *General Motors* v. *EPA*, *supra*, 871 F.2d at 504.

Act" by barring EPA from committing itself to an enforcement action until the Agency has made up its mind about the validity of the SIP revision. The First Circuit's approach, on the other hand, does little or nothing to address this problem. Since the First Circuit would permit enforcement actions to proceed in these circumstances, the pressure on EPA to disapprove SIP revisions in cases subject to enforcement actions will continue unabated. In this respect as well, therefore, the Fifth Circuit's approach is clearly superior to that of the First Circuit.

D. The *American Cyanamid* Remedy, Unlike Other Proposed Remedies, Does Not Require Extensive And Continuing Judicial Involvement In EPA's Allocation Of Agency Resources.

In contrast to the First Circuit's "two-fold" remedy, the *American Cyanamid* enforcement bar involves relatively little judicial interference with EPA's administrative and enforcement decisions. EPA is left entirely free to decide when it will act on a SIP revision. It is also left entirely free to prosecute any enforcement action that it chooses—provided that it first acts on any SIP revision that, if approved, would be inconsistent with such an action.[50] How EPA makes these decisions, and how it allocates its resources to support them, is left entirely to the Agency's discretion, and the courts would not examine how that discretion is exercised.

The alternative remedies proposed by the First Circuit in this case are a very different matter. The First Circuit suggested that there should be two principal remedies available for dealing with EPA's delay: (1) consideration by the district court in a penalty action of the reasonableness of the delay as a factor relevant to the amount

[50] As noted at pp. 25-26 above, this should not be difficult for EPA to accomplish.

of penalties, and (2) a civil action pursuant to Section 304(a)(2) of the Act to compel EPA to act.[51]

The First Circuit's "penalty reduction" approach would result in intense judicial examination and involvement in EPA's internal management. If the "reasonableness" of EPA's delay is a factor relevant to the determination of penalties,[52] then the way in which EPA goes about deciding how to conduct its review of the revision, including its internal schedule for review, the manpower assigned to the project, and similar matters, would be open to examination.[53] The court would have to decide, *inter alia*, whether the Agency should have committed more resources to reviewing the particular revision at issue, or whether the review process should have been managed more efficiently. Ultimately, the court would be required to examine and opine on the efficiency and reasonableness of EPA's internal management.[54] Obviously, this burden-

[51] 876 F.2d at 1067-68. Section 304(a)(2) authorizes a civil action by "any person" to compel EPA "to perform any act or duty under this Act which is not discretionary. . . ." 42 U.S.C. § 7604(a)(2).

[52] In stating the relevant standard for judging EPA's delay as one of "reasonableness" (876 F.2d 1068), the First Circuit appears to have misinterpreted existing law on the defenses available for noncompliance with mandatory statutory deadlines. The courts have traditionally regarded such noncompliance as excusable only where compliance is impossible. *See* n. 60 below. As a matter of law, no other type of delay can be regarded as "reasonable" where Congress has mandated that the Agency act within a specific period of time.

[53] The district court may also become enmeshed in consideration of the merits of EPA's decision to disapprove the SIP revision, even though judicial review on that subject is normally within the jurisdiction of the court of appeals. 42 U.S.C. § 7607(b)(1).

[54] *See, e.g., Natural Resources Defense Council* v. *Thomas*, 705 F. Supp. 1, 4 (D.D.C. 1988). In many cases, such a defense would presumably require factual findings following a trial. In such cases, the State or other party bringing the action would presumably be entitled to discovery concerning EPA's handling of the revision.

some and difficult task should not lightly be visited on the courts.

The mandamus remedy suggested by the First Circuit suffers from similar deficiencies. A suit by companies or states to compel Agency action under § 304 of the Act will require the diversion of resources by all parties to expensive and time-consuming litigation.[55] Given EPA's track record in acting on SIPs and complying with other statutory deadlines, even when faced with litigation, this remedy is not likely to be effective. In *Alcan Foil Products*, for example, the Commonwealth of Kentucky had filed an action under Section 304(a) even before EPA brought its enforcement action against Alcan.[56] As of the time of the Sixth Circuit's decision, the state had received no relief. The Sixth Circuit concluded that the remedy under Section 304 was therefore "not very effective." Slip op. at 14. The Sixth Circuit's conclusion is supported by the dilatory EPA action in complying with mandatory statutory deadlines and court orders in similar contexts.[57]

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[55] The courts that have addressed EPA's failure to comply with the four-month rule have treated such compliance as a nondiscretionary duty. *See* p. 14, *supra*. This treatment is consistent with this Court's rulings in *Train* v. *Natural Resources Defense Council* and *Union Electric Co.* v. *EPA* that the requirements of Section 110(a) are mandatory in nature. *See Train*, 421 U.S. at 79-80; *Union Electric Co.*, 427 U.S. at 256.

[56] In this regard, we would note that Congress can hardly have intended that states would have to sue EPA to preserve their role in the federal-state partnership created by the Act. In *American Cyanamid*, the Fifth Circuit rejected EPA's suggestion that parties aggrieved by EPA's failure to meet the four-month deadline were limited to a remedy under § 304 of the Act. As the court pointed out: "EPA must review a revision within four months whether or not the state or some other party sues to hasten its decision. A suit to force the agency to act is one remedy, but should not be the only remedy for delay, once the interests of the *states* themselves are recognized." 810 F.2d at 501, n.11 (emphasis added).

[57] For example, EPA missed—in many cases by years—the statutory

Such delay can make a § 304 remedy meaningless, and thus ineffective to deal with the intrusion on state prerogatives.

Even leaving aside the problem of effectiveness, the scope of judicial involvement in EPA's internal policymaking and administration in § 304 suits would be dramatically increased if the First Circuit approach is followed rather than that in *American Cyanamid*. Absent a bar on enforcement, the only way that a source subject to a SIP revision could protect itself against penalties for violating the old SIP would be to file a Section 304 action. Under these circumstances, *every* such source may feel compelled to do so, no matter how certain it might be that EPA would ultimately approve the SIP revision.[58] States may also routinely file such suits. Instead of facing a possible enforcement bar for only a handful of cases, therefore, EPA would be faced with Section 304 lawsuits across the country for a large proportion of the SIP revisions it re-

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four-month deadline for review of *original* SIPs promulgated to meet the NAAQS for lead. In 1983, pursuant to a settlement agreement in an action brought under Section 304, the United States District Court for the District of Columbia entered a consent order requiring EPA to act promptly on the outstanding state plans. *See Natural Resources Defense Council* v. *Thomas*, *supra*, 705 F. Supp. at 2 (D.D.C. 1988). Yet several years later, EPA had still not completed its review of several of the SIPs, a delay that the district court characterized as "inexcusable." *Id.* at 4; *see also Sierra Club* v. *Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984) (holding EPA in contempt for failure to comply with court order enforcing statutory deadlines for promulgation of regulations on hazardous air pollutants). Obviously, therefore, the remedy of a court order under Section 304 has at best a limited impact on the Agency's dilatory behavior.

[58] It would be cold comfort to a company that was considering acting in accord with the revised state regulation that EPA *might* not sue it, or that, if any enforcement action was brought, the unreasonableness of EPA's delay *might* result in a reduction of penalties. It is worthy to note that General Motors' request for an extension was submitted pursuant to a published EPA policy, and there was good reason to believe that the SIP revision was approvable. *See* n.5 above.

ceives every year.[59] If EPA resisted the issuance of such orders on the ground that prompt action in certain cases was impossible,[60] then a number of courts would have to examine in detail EPA's allocation of resources in its SIP review program, as well as other aspects of the management of that program, to assess the validity of that defense. This situation would raise the possibility of competing or even conflicting demands on EPA resources. If protective actions were filed by a large number of companies subject to SIP revisions, the end result would be virtually complete judicial management of EPA's SIP review program. Again, this is neither a result Congress intended nor a function for which the courts are best suited.

What the courts *are* well-equipped to do is to decline, as the Fifth Circuit did in *American Cyanamid*, to become parties to EPA's deliberate policy of flouting the procedural requirements of the Clean Air Act. By bringing en-

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[59] One wonders why EPA would support the First Circuit's mandamus remedy given its claim that it cannot meet the four-month deadline in any event.

[60] The courts have in certain cases recognized that there may be cases in which it is simply impossible for EPA to meet a statutory deadline. However, the courts have stressed that:

> "the agency [bears] a heavy burden to demonstrate the existence of an impossibility: 'An equity court can never exclude claims of inability to render absolute performance, but it must scrutinize such claims carefully since officials may seize on a remedy made available for extreme illness and promote it into the daily bread of convenience.' "

Alabama Power Co. v. *Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979) (quoting *NRDC* v. *Train*, 510 F.2d 692, 713 (D.C. Cir. 1974)); *see also Sierra Club* v. *Gorsuch*, 551 F. Supp. 785 (N.D. Cal. 1982); *Natural Resources Defense Council* v. *Thomas*, *supra*. Where, as here, EPA has converted noncompliance with the statutory deadline into "the daily bread of convenience" as a matter of policy, a detailed showing would be required in every individual case that prompt action on the revision at issue was in fact impossible.

forcement actions that ignore pending SIP revisions—without regard to the actual merits of those revisions—EPA seeks to invoke the power of the courts to impose penalties against parties who, even EPA must admit, might not have committed any violation if EPA had acted promptly.

Certainly Congress did not intend the enforcement provisions of the Act to be used to prosecute violations stemming from EPA's own delay in confirming a change in the applicable law. If EPA wants to seek administrative or civil penalties against a company for acting in a manner inconsistent with the Clean Air Act, then the Agency must first decide for itself whether the company's conduct is *in fact* inconsistent with the Act. That means that if the company would not be in violation if EPA approved a pending SIP revision, EPA must first act to complete its review of that revision before bringing an enforcement action.

CONCLUSION

For the reasons stated above, General Motors respectfully requests that the decision of the United States Court of Appeals for the First Circuit be reversed and that this case be remanded with instructions that an order be entered affirming the judgment of the District Court.

Respectfully submitted,

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APPENDIX

APPENDIX

Pertinent provisions of the Clean Air Act, 42 U.S.C. § 7401, et al., are as follows:

§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control re-

gion (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification,

construction, and operation of any stationary source, including a permit program as required in parts C and D and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply; . . .

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordinator Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) pro-

mulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted. . . .